FILED
JUN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1783

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANK ASTA, *et al.*,
Petitioners,

v.

STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

---

BRIEF AMICUS CURIAE OF THE SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

DONALD L. MORGAN *
W. RICHARD BIDSTRUP
PAMELA B. LAWRENCE
CLEARY, GOTTLIEB, STEEN
& HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700
Counsel for Amicus Curiae Synthetic Organic Chemical Manufacturers Association

* Counsel of Record

June 30, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Occupational Safety and Health Act of 1970 preempts state criminal prosecutions based on conduct or conditions regulated by the Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE INTEREST OF AMICUS CURIAE	2
A. SOCMA and Its Members	2
B. The Factual Context of the Indictments	3
ARGUMENT	10
I. THE OSH ACT ESTABLISHES A DETAILED FEDERAL REGULATORY SCHEME FOR WORKPLACE SAFETY AND HEALTH THAT SHOULD NOT BE DISPLACED	10
A. OSHA Standards Are To Be Based on the Best Available Scientific Evidence Respecting Health Effects and Feasibility	11
B. The OSH Act Establishes Detailed Procedural Protections That Ensure Careful Enforcement of OSHA Standards	14
C. The OSH Act Carefully Delineates the Role of States in Addressing Workplace Safety and Health Issues	16
D. State Criminal Prosecution Such As That Below Is Preempted by the OSH Act	17
II. CRIMINAL PROSECUTIONS BASED ON GENERAL STATE CRIMINAL LAWS WOULD REINTRODUCE THE CONFUSION CONGRESS INTENDED TO AVOID AND WOULD UNDULY BURDEN INDUSTRY	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page
American Textile Manufacturers Institute v. *Donovan*, 452 U.S. 490 (1981)	12, 13
Duriron Company, Inc., 6 O.S.H. Cas. (BNA) 1701 (Rev. Comm'n Final Order June 2, 1978)	5
Illinois v. *Asta, et al.*, 534 N.E.2d 962 (Ill. 1989)	1, 2
Industrial Union Department, AFL-CIO v. *American Petroleum Institute*, 448 U.S. 607 (1980)	12, 13
New Jersey State Chamber of Commerce v. *Hughey*, 774 F.2d 587 (3d Cir. 1985)	17
New Jersey State Chamber of Commerce v. *New Jersey*, 653 F. Supp. 1453 (D.N.J. 1987)	17
Senco Products, Inc., 10 O.S.H. Cas. (BNA) 2091 (Rev. Comm'n Decision Oct. 29, 1982)	5
Society of the Plastics Industry v. *OSHA*, 509 F.2d 1301 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975)	13
United Steelworkers of America v. *Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981)	13

STATUTES	
29 U.S.C. § 651 *et seq.*	2
29 U.S.C. § 654(a)(1)	11
29 U.S.C. § 655	11, 12
29 U.S.C. § 656	13
29 U.S.C. § 657	14
29 U.S.C. § 658	14
29 U.S.C. § 660	14, 15
29 U.S.C. § 661	15
29 U.S.C. § 662	15
29 U.S.C. § 664	12
29 U.S.C. § 666	14, 15
29 U.S.C. § 667	16, 17
29 U.S.C. § 669	13
29 U.S.C. § 670	13
29 U.S.C. § 671	13
N.C. Gen. Stat. § 95-139	17

TABLE OF AUTHORITIES—Continued

REGULATIONS Page

29 C.F.R. § 1901.2 18
29 C.F.R. § 1910.1000 ..... 4, 14
29 C.F.R. § 1910.1017 13
29 C.F.R. § 1910.1025 13
29 C.F.R. § 1910.1028 13
29 C.F.R. § 1910.1043 13
29 C.F.R. § 1952.1 17
36 *Fed. Reg.* 10465 (May 29, 1971) 12
48 *Fed. Reg.* 53280 (Nov. 23, 1983), as amended, 52 *Fed. Reg.* 31852 (Aug. 24, 1987) 13
54 *Fed. Reg.* 2332 (Jan. 19, 1989) 14

LEGISLATIVE MATERIALS

Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act, 92d Cong., 1st Sess. (1971) ..... *passim*
S. 490, 101st Cong., 1st Sess., 135 *Cong. Rec.* S1931-32 (daily ed. Mar. 1, 1989) 16
S. 2518, 100th Cong., 2d Sess., 134 *Cong. Rec.* S7886-89 (daily ed. Jun. 15, 1988) 16
H.R. 4856, 100th Cong., 2d Sess. (1988) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1783

FRANK ASTA, *et al.*,
Petitioners,

v.

STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF AMICUS CURIAE OF THE SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Synthetic Organic Chemical Manufacturers Association ("SOCMA") submits this brief, as *amicus curiae* pursuant to Sup. Ct. Rule 36.1, in support of the petition for a writ of certiorari.[1] The decision below, reported at 534 N.E.2d 962 (Ill. 1989), was attached to the petition.

[1] The parties have consented to the filing of this brief *amicus curiae*. The letters giving consent were filed with the Court separately.

STATEMENT OF THE INTEREST OF AMICUS CURIAE

A. SOCMA and Its Members

SOCMA is a non-profit trade association of approximately 170 firms engaged in the manufacture of synthetic organic chemicals. SOCMA's member firms produce over 5,000 distinct organic chemicals, primarily intermediate and finished chemicals used in industrial applications. Over 60 percent of SOCMA's member firms are considered small businesses with annual synthetic organic chemical sales below $50 million. SOCMA's members have several hundred workplaces, some large, some small, all of which have employees with responsibilities for occupational safety and health.

SOCMA has a strong and abiding interest in the development of workplace safety and health standards. SOCMA has participated in rulemaking, enforcement, and priority setting of the Occupational Safety and Health Administration ("OSHA") since its inception in 1970, and has sought an OSHA program that is scientifically sound, protective of employee safety and health, and feasible for employers. SOCMA has kept its membership informed of significant OSHA developments and has sponsored a variety of seminars and informal workshops to facilitate member compliance with the Occupational Safety and Health Act ("the OSH Act"), 29 U.S.C. § 651 *et seq.*, and OSHA standards.

SOCMA's members are subject to extensive workplace safety and health regulation under the OSH Act. SOCMA's members operate facilities where employees are inevitably exposed to chemicals subject to regulations by OSHA. Those facilities are designed, operated, and from time to time modified, so as to comply with OSHA standards. In the decision below, the Illinois Supreme Court stated that "if a defendant were in compliance with OSHA standards it is unlikely that the State would bring prosecutive action." 534 N.E.2d at 969. SOCMA's members'

concerns are not allayed. The opinion elsewhere makes clear that such compliance would not be a defense, and SOCMA's own investigation of the facts[2] shows that the employer's allegedly criminal conduct was in fact in compliance with such standards.

SOCMA's members thus are concerned that application of general state criminal laws to employers for allegedly hazardous workplace conditions would subject employers to the whims of prosecutors, regardless of diligence in complying with OSHA standards. Those laws, unlike OSHA standards, do not provide clear standards based on scientific evidence respecting health effects and feasibility.[3] Nor do such prosecutions reflect the procedures mandated by the OSH Act if a state desires to assume authority to address occupational safety and health matters. Because employers base business decisions on the regulations affecting their processes, such uncertainties could wreak havoc on industry. Indeed, because there is no objective basis to guide employer conduct, such prosecutions raise the issue whether application of general state criminal laws to employers comports with due process notice requirements.

B. The Factual Context of the Indictments

The prosecution below was commenced in a politically-charged climate of poor labor-management relations. Chicago Magnet Wire Corp. ("the Company") frequently was inspected by OSHA and had a good compliance record with OSHA standards. Even analysis conducted

---

[2] Since the case comes up on pretrial dismissal of the indictments, not all of these facts appear in the record.

[3] For example, the indictments below charged aggravated battery, reckless conduct and conspiracy under general state criminal law for exposing employees to "poisonous and stupifying substances" and for violation of the "duty to provide . . . a safe workplace," but are silent, as are the criminal statutes, as to what levels of exposure constitute criminal conduct.

by an independent industrial hygiene consulting firm retained by the prosecutors concluded that the Company was complying with OSHA standards relating to exposure to chemicals, the effects of which were the primary allegations in the indictments.

According to representatives of the Company, beginning in the late 1970s management had a difficult relationship with the Service Employees International Union AFL-CIO, Local 25, ("the Union"), which represented many of the Company's employees. The Union became critical about workplace safety and health issues as a way to maintain the employees' interest in union activities. The Union encouraged employees to file internal grievances regarding safety and health, workers' compensation claims, and complaints with OSHA.

In response, OSHA conducted extraordinarily close scrutiny of safety and health conditions at the Company's workplace. Between 1976 and 1983, the period covered by the indictments, OSHA conducted eight on-site inspections, some as little as three months apart. At least half of these inspections occurred in response to employee complaints. OSHA obtained and analyzed the employees' medical records. And OSHA wrote to the Company recommending, although not mandating, additional steps beyond compliance with the OSHA standards that the Company could take to improve its workplace.

It is noteworthy that not one of the inspections revealed violations of OSHA's permissible exposure limits ("PELs") for individual airborne contaminants.[4] OSHA

---

[4] After the inspection of October 25, 1983, the Company was cited for exposing one employee to multiple airborne contaminants in violation of the "mixture rule," 29 C.F.R. § 1910.1000(d)(2)(i). The mixture rule purports to prohibit exposure to combinations of regulated chemicals above a level determined by the formula stated in the standard, even if the exposure to each individual chemical is below the PEL for that chemical. However, the rule is unenforceable because it omits a requirement of additivity

issued only a few citations for violation of other OSHA standards; in those cases the Company took timely abatement action. Four of the inspections resulted in no citations whatsoever, and none of the violations was considered willful.

Inspection of October 19, 1976.[5] OSHA cited the Company for two non-serious violations relating to the OSHA noise standard.

Inspections of March 1977 and June 3, 1977.[6] Neither the programmed inspection in March 1977 nor the inspection on June 3, 1977, which occurred in response to an employee complaint,[7] resulted in any citation. An OSHA report to the complaining employee about the June 1977 investigation describes the results of both inspections:

> During the inspection, it was determined that Chicago Magnet Wire Corporation does not have phenol (C_6H_5OH) in the plant and that the housekeeping was adequate. The odor . . . [deleted by OSHA] was most probably due to cresol, a compound used during manufacturing processes at Chicago Magnet Wire Corporation. However, three months ago Chicago Magnet Wire had a complete OSHA industrial hygiene inspection and was found to be in compliance with the OSHA Airborne Contaminant Standards as

---

of health effects that was a key component of the consensus standard from which OSHA derived the formula. *Senco Products, Inc.*, 10 O.S.H. Cas. (BNA) 2091 (Rev. Comm'n Decision Oct. 29, 1982); *Duriron Company, Inc.*, 6 O.S.H. Cas. (BNA) 1701 (Rev. Comm'n Final Order June 2, 1978).

[5] OSHA Citation and Notification of Penalty No. S7275-012, Jan. 6, 1977.

[6] OSHA Safety and Health or Accident Inspection Report (hereinafter "OSHA Report") No. Q6677-026, June 6, 1977.

[7] OSHA conducts unannounced inspections of facilities on a regular basis ("programmed inspections") and also conducts inspections in response to employee complaints.

> well as housekeeping standards. The industrial hygienist for the company assured us that none of the manufacturing processes at Chicago Magnet Wire have changed within the past 3-4 years.[8]

Letter from Frank C. Memmott, OSHA Area Director, June 14, 1977.

Inspection of November 2, 1977 to March 10, 1978.[9] After this inspection, which was triggered by an employee complaint, OSHA cited the Company for not inspecting one respirator on a regular basis, for maintaining one respirator and air pack in poor working order, and for not having written procedures available for emergency respirator usage. In a March 14, 1978 letter to the complaining employee, OSHA Area Director Frank Memmott stated:

> Regarding your complaint, air samples were taken in the plant during the inspection to determine employee exposure to cresylic acid. The sample analysis results have been returned from our laboratory. All of the sample results were below the permissible OSHA exposure levels. At the time of the inspection, the ventilation system appeared to be adequate.

Following the citations, the Company promptly corrected its procedures for respirator inspection and usage.

Inspection of May 31, 1979.[10] In this inspection, again in response to an employee complaint, OSHA found no violations and issued no citations. In its response to the complaining employee, OSHA stated:

> Regarding your complaint, both of the conditions you expressed concern about have been evaluated

---

[8] This, and other letters to complaining employees, reflected OSHA's policy of affording the employee the right to informal review of the conclusions from the inspection.

[9] OSHA Report No. W7066-075, June 9, 1978.

[10] OSHA Report No. S7275-102, June 7, 1979.

> during previous inspections and neither was found to be in apparent violation of the standards. Neither of these processes have changed since the other investigations; for these reasons, our office contemplates taking no further action on your complaint at this time.

Letter from Morley Brickman, OSHA Acting Area Director, June 8, 1979.

Inspection of March 23, 1982.[11] No citations were issued as a result of this programmed inspection.

Inspection of July 21, 1983 to August 8, 1983.[12] After this inspection, conducted in response to another employee complaint, OSHA cited the Company for several violations relating to the noise standard, the need for better procedures for dealing with spills and for storage of flammable liquids, the need for electrical improvements, the need for quick washing facilities, and failure to provide full access to medical records. The Company filed a notice of contest of the citations and subsequently entered a settlement agreement with OSHA. The Settlement Agreement, OSHRC Docket No. 83-1007 (Nov. 7, 1984), which was signed by OSHA, the Company, and the Union, recited that abatement action had been completed.

Inspection of October 25, 1983 to November 1, 1983.[13] Following this programmed inspection, OSHA issued citations for failure to provide individual respirators and, as discussed above, for the violation of the mixture rule. The Company also contested these citations and subsequently entered into a settlement agreement with OSHA.[14]

---

[11] OSHA Report No. B4804-753, Mar. 23, 1982.

[12] OSHA Report No. H2156-199, Sept. 20, 1983.

[13] OSHA Report No. H2156-206, Dec. 2, 1983.

[14] As discussed at n.4, *supra*, the mixture rule is unenforceable. The Company decided to settle rather than contest this citation solely to avoid the costs of litigation.

The Settlement Agreement, OSHRC Docket Number 83-1292 (Dec. 14, 1984), again recites that the Company had completed abatement action. In a subsequent letter, OSHA acknowledged the Company's compliance with the individual PELs. OSHA further recommended, but did not mandate, installation of controls to mitigate any possible cumulative effect of exposure in areas where employees work 12-hour shifts; more extensive monitoring to determine if certain workers had become sensitized; and repiping of certain vents to the outside of the building. Letter from Josephine O'Brien, OSHA Area Director, to Tony Jordan, President, Chicago Magnet Wire Co., Dec. 23, 1983.

Following the October 1983 inspection, OSHA also commenced a special review of medical records of all employees who had been at the workplace at any time from January 1982 to December 1983.[15] The Company provided to OSHA its employee medical records, including the results of clinical laboratory tests and physical examinations conducted by Dr. William Buckingham, an eminent internist at Northwestern University. OSHA also reviewed all of the results of the examinations conducted by Dr. Mark Round, who had examined the employees at the behest of the Union. After conducting "an extensive review" of these data, OSHA concluded:

> Despite the extensive laboratory investigations [an apparent reference to the clinical testing conducted at Northwestern] the objective data do not support evidence of any specific workplace-related occupational disease.[16]

---

[15] Letter of Thorne A. Auchter, Assistant Secretary of Labor for Occupational Safety and Health and Stanley C. Haimes, OSHA Medical Records Officer, to Chicago Magnet Wire Co., Dec. 6, 1983.

[16] Memorandum from Ralph Yodaiken, M.D., Director, OSHA Office of Occupational Medicine, to Frank Strasheim, OSHA Regional Administrator, April 2, 1984.

Thorough scrutiny by OSHA showed that the conditions at the Company's workplace did not present known hazards to employees. Nonetheless, in 1983, a disgruntled former employee swore out a criminal complaint against the five individual petitioners and the Company. Other employees joined in, going to then-Cook County State's Attorney Richard M. Daley ("Daley") to seek action on their complaints about the workplace conditions.

Daley commenced an investigation and convened a grand jury in February 1984.[17] During the course of the investigation, Daley arranged for an outside industrial hygiene firm to conduct monitoring in the Company's workplace. Based on the results of air sampling conducted on June 28, 1984, the firm concluded that "inhalation of solvent vapors does not constitute a major health hazard, since solvent exposure was below the OSHA Permissible Exposure Limit." Industrial Hygiene Survey Report, Chicago Magnet Wire Corporation, June 28,

---

[17] The investigation and subsequent prosecution generated significant publicity. *See, e.g.*, "Officials probe unsafe-factory charges," *The Daily Herald*, Nov. 4, 1983; "Jury probes local factory," *The Daily Herald*, Feb. 28, 1984 (front page story); WMAQ-TV (NBC) 4:30 p.m. News, Sept. 25, 1984 (Daley shown giving statement at press conference); "Factory executives indicted; Elk Grove firm lied to workers about hazards: Daley," *The Daily Herald*, Sept. 26, 1984 (front page story); "Suburb firm's execs charged with exposing workers to gas," *Chicago Sun-Times*, Sept. 26, 1984 (Daley quoted regarding conditions at the plant); "Indicted firm has history of pollution problems," *Chicago Tribune*, Sept. 27, 1984 ("The indictments mark the second time in the last year that Cook County State's Atty. Richard Daley has sought criminal charges against a corporation for injuries to workers."); "Local man indicted in toxic chemical case," *Highland Park News*, Sept. 27, 1984 (Daley quoted); "Company officers indicted for worker injuries," *Business Insurance*, Oct. 1, 1984 (quoting Daley); WBBM-TV 6:00 p.m. News, Feb. 5, 1986 ("Cook County State's Attorney, Richard Daley, says one courtroom defeat will not stop him from prosecuting corporate officials for workplace hazards.").

1984.[18] The tables appended to the report show that the exposure levels for all chemicals studied were well below the PELs.

Daley submitted neither the extensive OSHA record nor the results of his own investigation to the grand jury. Nor did he present the testimony of Dr. Buckingham, who had concluded that there was no evidence of workplace-related illness or injury. The primary evidence before the grand jury was the testimony of current and former employees. The grand jury issued the initial indictments in September 1984 and superseding indictments in June 1985.

ARGUMENT

I. THE OSH ACT ESTABLISHES A DETAILED FEDERAL REGULATORY SCHEME FOR WORKPLACE SAFETY AND HEALTH THAT SHOULD NOT BE DISPLACED

The Illinois Supreme Court's decision squarely conflicts with the OSH Act's intent to establish a comprehensive federal scheme of occupational safety and health regulation, with a carefully delineated state role. The legislative history of the OSH Act, which has not been substantively amended in its almost twenty years, is replete with statements that Congress enacted the OSH Act because the states were not doing an adequate job of addressing safety and health aspects of working conditions.[19] The OSH Act includes detailed procedures to ensure that occupational safety and health regulations have a sound

---

[18] The report notes the possibility of combined effects from different solvents or different routes of exposure. However, no analyses were performed to show whether there was a factual basis to support such a concern. *Id.* at 2.

[19] *See, e.g., Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970*, 92d Cong., 1st Sess. at 141, 144, 324, 413, 1033, 1049 (1971) (hereinafter "*Legis. History*").

scientific basis and are carefully enforced. Congress further established that states may assume jurisdiction over occupational safety and health issues only by following certain specific procedures. Illinois decided not to obtain such authority.

A. OSHA Standards Are To Be Based on the Best Available Scientific Evidence Respecting Health Effects and Feasibility

The regulatory scheme adopted by the OSH Act has two basic components: (1) requirements that would address occupational safety and health promptly after enactment of the OSH Act in 1970; and (2) detailed procedures for establishing, over the longer run, objective standards based on the best available scientific evidence respecting health effects and feasibility.

Congress began with the general duty clause, OSH Act Section 5(a)(1), 29 U.S.C. § 654(a)(1), which establishes a self-implementing requirement that every employer protect its employees from "recognized hazards" that "are causing or are likely to cause death or serious physical harm." By limiting applicability of the general duty clause, Congress expressed a preference for specific standards. Congress expected that over time the general duty clause would play a decreasing role as OSHA promulgated more standards which would provide more specific guidance to employers, and more comprehensive protection for employees. *See, e.g., Legis. History* at 1217.

Next, Congress authorized and directed OSHA to issue precise health and safety standards, in two steps. First, during the first two years of the effectiveness of the OSH Act, OSHA could adopt as OSHA regulations a variety of preexistent federal and private consensus standards. Section 6(a), 29 U.S.C. § 655(a).[20] OSHA adopted num-

[20] This extraordinary waiver from the notice and comment rulemaking requirements of the Administrative Procedure Act was designed to facilitate the prompt issuance of standards.

erous standards under this provision. 36 *Fed. Reg.* 10465-714 (May 29, 1971).

Congress further provided for normal notice and comment rulemaking to enable subsequent adoption of additional standards. Section 6(b), 29 U.S.C. § 655(b). Congress required OSHA to use particular care in developing standards. Section 6(b)(5) directs OSHA to use "the best available evidence," including "research, demonstrations, experiments, and such other information as may be appropriate"; "the latest available scientific data in the field"; and the "experience gained" by OSHA. 29 U.S.C. § 655(b)(5); *see also Legis. History* at 202 ("the development of occupational health and safety standards involves technical and complex problems requiring professional expertise and competence"). Congress further recognized that it would not be possible for employers to provide workplaces completely free of any hazard. Instead, Congress conditioned OSHA's standard-setting authority on economic and technological feasibility and limited OSHA's authority to regulation only of significant risks of material impairment to health. Section 6(b)(5), 29 U.S.C. § 655(b)(5); *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 508 (1981); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 642, 647-48 (1980).[21]

Congress established other federal entities to assist OSHA in these tasks. The National Institute of Occupa-

---

[21] Congress also recognized employers' concerns by authorizing the Secretary to grant variances or exemptions from standards and providing for protection of employers' trade secrets. Sections 6(d), 16, 29 U.S.C. §§ 655(d), 664. On the other hand, Congress also gave OSHA extraordinary authority to establish emergency temporary standards, without notice and comment rulemaking, upon a determination that a "grave danger" is presented by exposure to toxic or physically harmful substances or by new hazards and that an emergency standard is necessary to protect employees from such danger. Section 6(c), 29 U.S.C. § 655(c).

tional Safety and Health ("NIOSH") researches occupational safety and health issues and conducts educational and information programs for the dual purposes of developing personnel qualified to carry out the purposes of the OSH Act and informing employers and employees of the importance and proper use of equipment. Sections 20-22, 29 U.S.C. §§ 669-71. Congress also established the National Advisory Committee on Occupational Safety and Health to advise OSHA and the Secretary of HHS on matters relating to workplace safety and health. The Committee meets at least twice yearly and is composed of twelve members representing management, labor, occupational safety and health professionals, and the public. Section 7(a), 29 U.S.C. § 656(a). In addition to this permanent body, OSHA may convene ad hoc advisory committees to assist in setting standards. Section 7(b), 29 U.S.C. § 656(b).

OSHA has used its Section 6(b) and 6(c) authority on many occasions. The OSHA rulemakings include substance-specific standards, such as those for vinyl chloride, lead, benzene, and cotton dust;[22] the generic Hazard Communication Standard,[23] which requires employers to assess hazards of every substance in the workplace, to

---

[22] 29 C.F.R. §§ 1910.1017, 1910.1025, 1910.1028, 1910.1043. These substance-specific standards typically include exposure limits (frequently an eight-hour time-weighted average and a short-term or ceiling limit) and provisions regarding monitoring, medical surveillance, training, and labeling. These particular standards were the subject of protracted litigation, and reflect substantial judicial consideration. *American Textile Manufacturers Institute* v. *Donovan*, *supra* (cotton dust standard); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, *supra* (benzene standard); *United Steelworkers of America* v. *Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) (lead standard); *Society of the Plastics Industry* v. *OSHA*, 509 F.2d 1301 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975) (vinyl chloride standard).

[23] 48 *Fed. Reg.* 53280 (Nov. 23, 1983), as amended 52 *Fed. Reg.* 31852 (Aug. 24, 1987).

provide relevant information and training to employees, and to provide relevant information to purchasers so they may appropriately train and educate their employees; and more recently, a comprehensive revision and expansion of the "Z Tables" at 29 C.F.R. § 1910.1000, which establish PELs for several hundred specific chemicals.[24]

B. The OSH Act Establishes Detailed Procedural Protections That Ensure Careful Enforcement of OSHA Standards

The OSH Act includes extensive and detailed enforcement provisions designed in part to ensure "fair and even" treatment of employers. *Legis. History* at 413. OSHA is authorized to enter and inspect and investigate workplaces and to question employers and employees at "reasonable times, and within reasonable limits and in a reasonable manner. . . ." Section 8(a), 29 U.S.C. § 657(a). Upon receipt of an employee complaint, OSHA is required to conduct a special inspection as soon as practicable, unless the Agency determines that there are not reasonable grounds to believe that a violation or danger exists. Section 8(f)(1), 29 U.S.C. § 657(f)(1).[25] Employer and employee representatives may accompany OSHA officials during the inspection. Section 8(e), 29 U.S.C. § 657(e). If a violation is observed, OSHA is required to issue, "with reasonable promptness," a written citation describing "with particularity the nature of the violation." The citation must be posted to enable review by employees. Section 9, 29 U.S.C. § 658.

---

[24] 54 *Fed. Reg.* 2332 (Jan. 19, 1989).

[25] The OSH Act includes detailed provisions to protect the integrity of the inspection process. Any person giving advance notice of an OSHA inspection to an employer is subject to criminal penalties. Section 17(f), 29 U.S.C. § 666(f). Congress also provided for protection of employees against discrimination for asserting rights under the Act and empowered the Secretary of Labor to protect those rights. Section 11(c), 29 U.S.C. § 660(c).

Congress created a specialized expert tribunal, the Occupational Safety and Health Review Commission ("the Commission"), to adjudicate alleged violations of the general duty clause and OSHA standards. Section 12, 29 U.S.C. § 661. The Commission was established as an independent agency to provide due process to employers [26] —there was a general belief that employers would receive a greater assurance of even-handed treatment than they might within the Department of Labor, which had traditionally regarded employees as its constituency. The Commission is composed of independent administrative law judges, and three commissioners appointed by the President with the advice and consent of the Senate "from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission. . . ." Section 12(a), 29 U.S.C. § 661(a).

Employers may contest citations before an administrative law judge of the Commission, with appeal of the judge's decision to the Commissioners.[27] As a further safeguard for employers, the decisions of the Review Commission are subject to review in the Courts of Appeals. Section 11(a), 29 U.S.C. § 660(a).

The OSH Act establishes civil and criminal penalties for violation of OSHA standards. Serious violations are subject to civil penalties of up to $1,000; willful or repeated violations are subject to civil penalties of up to $10,000. A willful violation causing death of an employee is subject to a criminal penalty of up to six months imprisonment and a fine of up to $10,000. Section 17, 29 U.S.C. § 666.[28]

---

[26] *Legis. History* at 392-93, 420, 1210.

[27] During the pendency of these proceedings, OSHA may seek injunctive relief to counteract imminent dangers. Section 13, 29 U.S.C. § 662.

[28] In the view of the Department of Justice and OSHA, the Comprehensive Crime Control Act of 1986 has increased the

In response to the preemption issue, prosecutors have asserted that the criminal penalties of the OSH Act are inadequate to properly punish employer misconduct. Such complaints should be addressed to Congress. Congress can at any time modify the penalties specified in the OSH Act, and it has considered proposals to do so.[29]

C. The OSH Act Carefully Delineates the Role of States in Addressing Workplace Safety and Health Issues

A primary purpose of the OSH Act was generally to establish uniform occupational safety and health standards. *Legis. History* at 141, 297, 413. Having adopted a comprehensive scheme to govern safety and health aspects of working conditions, Congress specifically provided for state jurisdiction in two narrowly-defined areas: (1) where there is no federal standard in effect respecting an occupational safety or health issue; and (2) where a state submitted and obtained federal approval of a plan for the development of state standards and their enforcement. Section 18(a), (b), 29 U.S.C. § 667(a), (b).

OSHA maintains close oversight over approval and administration of such plans. OSHA must scrutinize carefully any state plan in order to ensure that the plan meets each of the criteria of Section 18(c). 29 U.S.C. § 667(c).[30] Even after a state plan is approved, OSHA

---

maximum fines in the event of an employee fatality to $250,000 for individual defendants and $500,000 for corporate defendants.

[29] *See* S. 490, 101st Cong., 1st Sess., 135 *Cong. Rec.* S1931-32 (daily ed. Mar. 1, 1989) (increased civil penalties); S. 2518, 100th Cong., 2d Sess., 134 *Cong. Rec.* S7886-89 (daily ed. Jun. 15, 1988) and H.R. 4856, 100th Cong., 2d Sess. (1988) (increased criminal penalties—including up to 20 years imprisonment—and extension of criminal penalties to situations where willful violation of a standard caused serious injury or illness or where the violation caused a substantial probability that death or serious physical harm could result).

[30] The eight Section 18(c) criteria include designation of an administrative agency, development of standards and an inspection

retains jurisdiction to enforce its own standards until OSHA determines, based on at least three years of experience, that the state's administration of the plan will in fact meet the criteria of Section 18(c). Section 18(e), 29 U.S.C. § 667(e). OSHA then must make a continuing evaluation and may withdraw approval at any time upon notice to the state. Section 18(f), 29 U.S.C. § 667(f).

About 25 states and territories have completed the state plan process and have obtained federal approval to regulate occupational safety and health issues. *See* 29 C.F.R. § 1952.1. States that create state plans pursuant to Section 18(b) can, and some do, provide more severe criminal penalties than those established by the OSH Act. Significantly, North Carolina's state plan expressly provides for the application of state general criminal laws for willful violations that result in a fatality. N.C. Gen. Stat. § 95-139. Illinois has not availed itself of the opportunity to develop and implement a state plan.[31]

D. State Criminal Prosecution Such As That Below Is Preempted by the OSH Act

As Section 18 makes clear, once OSHA has issued a standard governing working conditions, the OSH Act "expressly preempts *state law pertaining to issues that are addressed by OSHA standards* unless a state plan has been approved by the Secretary," even where state law imposes more stringent requirements than the federal standard in effect. *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587, 592 (3d Cir. 1985) (emphasis added); *see also New Jersey State Chamber*

---

and enforcement mechanism "at least as effective" as that of OSHA, application of more stringent state standards only if "required by compelling local conditions" and "not unduly burden[some on] interstate commerce," and regular reporting to OSHA on administration of the plan.

[31] In fact, Illinois filed an application for state plan approval in November 1973, but withdrew the application in June 1975.

of Commerce v. *New Jersey*, 653 F. Supp. 1453, 1461, 1464 (D.N.J. 1987) ("Section 18(a) . . . provides that a state has jurisdiction over an occupational safety and health issue only if there is no federal standard in effect"). OSHA regulations confirm the broad scope of preemption. OSHA interprets Section 18 as "preventing any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which a Federal standard has been issued under section 6 of the Act." 29 C.F.R. § 1901.2.

The conflict between the decision below and the OSH Act is underscored by the fact that the principal allegations of the indictment involve exposure to airborne contaminants for which OSHA has established PELs, having made a judgment that such levels would be protective and can feasibly be attained. Absent preemption of such state prosecutions, individual prosecutors could determine after the fact what an employer should have done, without regard to the scientific data respecting significance of risk, without consideration of economic or technological feasibility, and without the protections for employers of the OSHA standard-setting process and adjudication of alleged violations by an expert review commission. This result would utterly frustrate the OSH Act procedures for development and enforcement of federal regulations and for close federal oversight over state regulatory efforts. Illinois should not be permitted to evade the statutory scheme, with its built-in protection for both industry and employees, by seeking, in effect, to regulate through arbitrary and ad hoc criminal prosecutions.

II. CRIMINAL PROSECUTIONS BASED ON GENERAL STATE CRIMINAL LAWS WOULD REINTRODUCE THE CONFUSION CONGRESS INTENDED TO AVOID AND WOULD UNDULY BURDEN INDUSTRY

Application of vaguely defined state criminal statutes to guide, indeed control, employer conduct respecting working conditions would produce changes of potentially immense economic significance. OSHA standards establish objective criteria which are set to provide protection, generally with a considerable margin of safety, against significant adverse health or safety risks. It is not uncommon, however, for a small percentage of workers in any workplace to be able to detect odors that may be offensive or otherwise to experience minor irritation due to exposure to chemicals at levels below the PELs. And from time to time, individual idiopathic reactions occur.

If employers must, upon pain of fine and imprisonment, provide working conditions in which no one will detect odors, experience minor irritation, or experience a hypersensitive reaction, the unlimited and strict liability which Congress decided not to impose when enacting the OSH Act will in essence be the governing law. That law would be established on a subjective and ad hoc basis by prosecutors and the complaining testimony of individual employees. This would completely upset the balance struck by Congress—that occupational standards are to establish objective criteria based on the best scientific evidence as to health effects and technological and economic feasibility, so as to provide precise notice to employers of the applicable requirements. Congress explicitly concluded that standards should "be expressed in terms of objective criteria," and that a vague common-law duty should not "be a general substitute for reliance on standards." *Legis. History* at 147, 150.

The expense of providing a workplace that would avoid a criminal prosecution such as that commenced below would far outstrip the expense of compliance with OSHA

standards. Moreover, ad hoc criminal prosecutions provide neither the notice nor consistency needed for rational business decisions. These potentially limitless added costs, along with the need for employers to try to make business decisions based on their predictions of what conduct could be subject to criminal prosecutions, could lead to major dislocations. Employers might feel compelled to move their operations to another state or even outside of the United States to protect their companies and supervisory employees from criminal prosecution. Further, these expenses could place American industry at a substantial competitive disadvantage in international trade. The effects of subjective and non-uniform standard-setting were the very basis for enactment of the OSH Act.

CONCLUSION

If allowed to stand, the decision of the Illinois Supreme Court would frustrate the congressional intent underlying the OSH Act. It would enable states to displace federal law completely without complying with the state plan provisions of Section 18 of the OSH Act. And it would result in additional prosecutions based on vague and unknowable criteria, rather than the carefully-developed standards issued under the OSH Act. For these reasons, SOCMA urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

DONALD L. MORGAN *
W. RICHARD BIDSTRUP
PAMELA B. LAWRENCE
CLEARY, GOTTLIEB, STEEN
& HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700
Counsel for Amicus Curiae
Synthetic Organic Chemical
Manufacturers Association

June 30, 1989

* Counsel of Record